IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1522 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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P M LALANI

Versus

STATE OF GUJARAT

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Appearance:

MR DP VORA for Petitioner

MR RC KODEKAR, AGP for respondents

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CORAM : MR.JUSTICE J.M.PANCHAL

Date of decision: 01/09/2000

ORAL JUDGEMENT

By means of filing this petition under Article 226 of the Constitution, the petitioner has prayed to issue a writ of mandamus or any other appropriate writ or order to quash and set aside order dated October 15, 1986 passed by the State Government under Clause (aa)(i)(1) of Rule-161 of the Bombay Civil Service Rules, 1959, by which the petitioner was made to retire compulsorily from

service with effect from January 20, 1987 in the interest of public service. The petitioner has further prayed to direct the respondents to determine pension payable to him on the basis of order dated December 5, 1987, by which notional increment as mentioned therein was sanctioned in favour of the petitioner. The petitioner has also prayed to direct the respondents to withdraw the departmental inquiry instituted against him, as it relates to stale incidences.

2. The petitioner was initially recruited as an Oversear on May 18, 1959 and in due course, was promoted to the post of Deputy Engineer. The petitioner was thereafter promoted as an Executive Engineer on May 29, 1980. Rule 161(1) of the Bombay Civil Service Rules, 1959 confers an absolute right on the competent authority to retire any government servant by giving him notice of not less than three months in writing or three months' pay and allowances in lieu of such notice, if it is satisfied that it is expedient in the public interest to do so. When the petitioner attained the age of 53 years, his case for continuance in service was considered by the Review Committee, which was of the opinion that the petitioner should be continued in service. However, the Government being the competent authority, reconsidered the whole case and after taking into consideration the service record, disagreed with the view expressed by the Review Committee. The Government was of the opinion that it was expedient in the public interest to retire the petitioner compulsorily from Government service. Accordingly, the Government passed an order on October 15, 1986 retiring compulsorily the petitioner from service with effect from January 20, 1987 in the interest of public service. That order is produced by the petitioner at Annexure-A to the petition. After the petitioner was made to retire compulsorily from service, Geologist-I, Ground Water Division (SIP), Rajkot by his order dated December 5, 1987 had sanctioned notional increments in favour of the petitioner. The said order is produced by the petitioner at Annexure-C to the petition. According to the petitioner, though a departmental inquiry was pending against him in the year 1979, he was promoted to the post of Executive Engineer on May 29, 1980 and, therefore, in view of the promotion granted to him, the order retiring him compulsorily from service was not justified. The petitioner has averred in the petition that he was allowed to cross Efficiency Bar under Government Order dated July 15, 1980 and as there were no adverse remarks recorded in his Service Book after his promotion to the post of Executive Engineer,the order retiring him compulsorily from service could not

have been passed. The petitioner has maintained that the order retiring him compulsorily from service is passed only in order to scuttle the inquiry which is initiated against him since 1987 and as the impugned order is passed by way of punishment, the same should be set aside. What is claimed in the petition is that in the years 1981-82, 1982-83 & 1984-85 the performance of the petitioner was found to be satisfactory and, therefore, subjective satisfaction arrived at by the competent authority that it is expedient to retire the petitioner from service in the interest of public service, is vitiated. Under the circumstances, the petitioner has filed present petition and claimed reliefs to which reference is made earlier.

3. Mr. G.B.Patel, Under Secretary to the Government of Gujarat, Narmada, Water Resources & Water Supply Department, Sachivalaya, Gandhinagar has filed reply affidavit controverting the averments made in the petition. In the reply, it is stated that before deciding to retire the petitioner compulsorily from service, his whole service record was taken into consideration and having regard to the averse remarks communicated to him as well as his performance and two departmental inquiries which were pending against him, subjective satisfaction was reached to retire him compulsorily from service, which is neither illegal nor arbitrary. What is maintained in the reply is that on scrutiny of the material facts, the Government was satisfied that it was not in the interest of public service to continue the petitioner in service and, therefore, decision to retire the petitioner prematurely cannot be regarded as contrary to the statutory provisions. It is further stated in the reply that the order of compulsory retirement is not passed against the petitioner as punishment nor does it implies any stigma or any suggestion of misbehavior on his part and, therefore, order retiring the petitioner compulsorily from service is not liable to be set aside. As far as grant of pension on the basis of notional increments is concerned, it is mentioned in the reply affidavit that the petitioner was made to retire prematurely on January 20, 1987; whereas notional increments are admissible to a Government servant who has retired voluntarily from service and, therefore, the petitioner is not entitled to any direction against the respondents to determine his pension on the basis of notional increments. In the reply it is also stated that the petitioner was granted provisional pension and other benefits admissible under the rules.

4. The petitioner has filed rejoinder affidavit reiterating what is stated by him in the petition and pleaded that the order retiring him compulsorily from service being arbitrary, illegal and unconstitutional, he is entitled to the reliefs claimed in the petition.

5. Mr. D.P.Vora, learned counsel for the petitioner submitted that the order retiring the petitioner from service compulsorily is passed to scuttle the inquiry initiated by service of chargesheet dated January 15, 1987 and as the impugned order is passed by way of punishment, the same should be set aside. It was pleaded by the learned counsel for the petitioner that the recommendation made by the review committee to continue the petitioner in service could not have been ignored by the State Government on the ground that the integrity of the petitioner was not beyond doubt, more particularly when no adverse remark relating to integrity of the petitioner was communicated to him though required by Circular dated September 5, 1981 issued by the General Administration Department of the State Government. It was emphasised that in the caveat application which was filed by the State Government in the present petition it was averred that decision to retire the petitioner compulsorily from service was taken having regard to his confidential report, but the confidential report of the petitioner for the last five years does not indicate that any adverse entry was made in the said report nor adverse remarks were ever communicated to the petitioner and, therefore, the impugned order should be set aside. Referring to Para-6 of the Government Resolution dated March 8, 1969, the learned counsel for the petitioner submitted that the use of colourless expression like average, tolerable etc. as well as cryptic, equivocal or vague remarks could not have been made and, therefore, though the petitioner had made representations against the remarks using colourless expression like - average etc., the same could not have been treated as adverse remarks for the purpose of passing the impugned order. What was emphasised is that having regard to the service record of the petitioner, the decision to retire him compulsorily from service, should be treated as arbitrary in the sense that no reasonable person would form the requisite opinion on the given material that it is expedient to retire the petitioner from service and, therefore, the reliefs claimed in the petition should be granted.

6. Mr. R.C.Kodekar, learned A.G.P. submitted that on many occasions adverse remarks made were communicated to the petitioner against which the petitioner had not

made any representation and, therefore, it is not correct to contend that in absence of adverse remarks, the impugned order could not have been passed. The learned counsel for the State Government submitted that adverse entry prior to earning of promotion or crossing of efficiency bar or picking up higher rank is not wiped out and can be taken into consideration while considering the overall performance of the employee during the whole of his tenure of service and, therefore, the competent authority was entitled to consider adverse entries prior to earning of promotion by the petitioner to the post of Executive Engineer. What was claimed on behalf of the respondents was that the order retiring the petitioner compulsorily from service is not passed by way of punishment, but is passed in the interest of public service after taking into consideration the whole service record of the petitioner, which indicates that over and above the adverse remarks, minor penalties were imposed on the petitioner and another inquiry was pending, as a result of which satisfaction of the Government cannot be treated as illegal or having been vitiated. The learned counsel for the State Government further submitted that the decision to retire Government servant prematurely is not a punishment, nor the competent authority is expected to draw a reasoned order and, therefore, the petitioner is not entitled to the reliefs claimed in the petition. It was also pointed out that neither the averments made in the caveat application, nor the circulars relied on by the learned counsel for the petitioner would indicate in any manner that formation of opinion that it is in the public interest to retire the petitioner compulsorily is vitiated in any manner or that the decision impugned in the petition is arbitrary in any manner and, therefore, the petition should be dismissed.

7. I have heard the learned counsel for the parties and taken into consideration the service record of the petitioner which was made available for perusal of the Court by the learned Government counsel. The contention that there were no adverse remarks, nor were they communicated to the petitioner and, therefore, the petition should be accepted, has no substance. The service record of the petitioner from 1975-76 to March 31, 1985 indicates that capacity of the petitioner to take quick and sound decision regarding execution of works was average and management and supervision of stores as well as knowledge of accounts rules and observance of the same was also average. For the year 1978-79, it was observed that the petitioner was reluctant to assume responsibility; whereas for the year 1981-82 it was noticed that the petitioner was of average

calibre. The record of the case shows that the petitioner was communicated those remarks and informed about his right to make representation against those remarks, but it is an admitted position that the petitioner had not made any representation against those remarks. Moreover, the record further indicates that several departmental inquiries were initiated against the petitioner and different punishments were imposed on him. By an order dated October 29, 1987, two increments of the petitioner were ordered to be withheld without future effect; whereas by an order dated February 17, 1979, order of censure was passed against the petitioner. Again, by an order dated September 11, 1979. an order of warning was issued against the petitioner. Similar order of warning was also passed against the petitioner on October 11, 1979. Thereafter chargesheet was issued against the petitioner on September 27, 1979 and March 12, 1980 for major punishment. By an order dated April 29, 1988, a direction to reduce Rs. 72/- every month for one year from the amount of pension payable to the petitioner was issued. Thus, the details mentioned above show that the service record of the petitioner was not satisfactory at all and it also included adverse entries. Along with the petition, the petitioner has produced certain remarks communicated to him to establish that his service record was fair and normal.Those remarks are produced at Annexures- I to L to the petition. A bare reading of those remarks makes it manifest that those remarks were communicated to the petitioner to improve his performance, though they were not treated as adverse. If the performance of the petitioner had been excellent, it was not necessary at all for the authorities concerned to communicate those remarks and ask the petitioner to improve his performance. The remarks produced on the record of the petition on the contrary indicate that the performance of the petitioner was not upto the mark and, therefore, those remarks were communicated to him to enable him to improve his performance. Therefore, the contention that in absence of adverse entries, the order could not have been made, cannot be accepted and is rejected hereby.

8. The plea that adverse entries prior to promotion of the petitioner to the post of Executive Engineer could not have been taken into consideration while passing the impugned order, is devoid of merits. It is true that earlier a view was expressed that an adverse entry prior to earning of promotion or crossing of efficiency bar or picking-up higher rank is wiped out and cannot be taken into consideration while considering the overall performance of the employee during the whole of his

tenure of service, but now it is well settled by the catena of decisions of the Supreme Court that an adverse entry prior to earning of promotion or cross of efficiency bar or picking-up higher rank is not wiped out and can be taken into consideration while considering the overall performance of the employees during the whole of his tenure of service. In State of Orissa and others v. Ram Chandra Das, AIR 1996 SC 2436, the Supreme Court has ruled that what is to be seen is whether the entire record of service was considered or not by the competent authority and when the entire record of service is required to be considered, adverse entry made prior to promotion can also be taken into consideration. What is held by the Supreme Court is that merely because a promotion has been given after adverse entries were made, that fact by itself cannot be a ground to note that compulsory retirement of the Government servant could not be ordered. According to the Supreme Court, adverse entries prior to promotion do not become inadmissible or irrelevant and can be taken into consideration to judge the overall expediency or necessity to continue the Government servant in service after he attains the required length of service. The pertinent observations of the Supreme Court made in Para-7 of the judgment are as under :-

"It is contended for the respondent that adverse entries for the two years referred to earlier and pending departmental proceedings would not be sufficient to compulsorily retire the Government servant on the premise that after promotion they would become irrelevant and minor penalty was imposed. It is true that the Government servant was allowed to cross the efficiency bar to enable him to avail the benefits to draw higher scale of pay after crossing the efficienty bar. The adverse remarks made are after promotion. Even otherwise, the remarks form part of service record and character role. The record of enquiry on conduct also would be material. Though minor penalty may be imposed on given facts and circumstances to act of misconduct, nevertheless remains part of the record for overall consideration to retire a Government servant compulsorily. The object always is public interest. The material question is : whether the entire record of service was considered or not ? It is not for the Court/Tribunal to see whether the decision of the Government to compulsorily retire the Government servant is justified or not. It is for the Government to

> consider the same and take a proper decision in that behalf. As stated earlier, it is settled law that the Government is required to consider the entire record of service. Merely because a promotion has been given even after adverse entries were made, cannot be ground to note that compulsory retirement of the Government servant could not be ordered. The evidence does not become inadmissible or irrelevant as opined by the Tribunal. What would be relevant is whether upon that state of record as a reasonable prudent man would the Government or competent officer reach that decision. We find that self-same material after promotion may not be taken into consideration only to deny him further promotion. if any, but that material undoubtedly would be available to the Government to consider the overall expediency or necessity to continue the Government servant in service after he attained the required length of service or qualified period of service for pension. It is also made clear that in this case adverse entries were made only after promotion and not earlier to promotion. Compulsory retirement is not a punishment. He is entitled to all the pensionary benefits."

9. The submission that the stand taken by the respondents in affidavit-in-reply to the effect that the integrity of the petitioner was doubtful, should not be sustained in absence of communication of such remarks to the petitioner also cannot be accepted. As noted earlier, several punishments were imposed on the petitioner at the conclusion of departmental inquiries. Moreover, chargesheet dated September 27, 1979 indicates that several serious allegations were levelled against the petitioner including defalcation of amount payable to daily-wagers. Moreover, another chargesheet dated January 15, 1987 also shows that not only negligence in performance of duties was alleged against him, but it was also alleged against the petitioner that because of his act of omission and commission, the State Government had suffered a loss of about 22 lacs when the pillar of acqaduct had fallen down. The averments made in the affidavit-in-reply show that on receipt of the report from the review committee, the Secretary (Personnel) of Government of Gujarat had taken into consideration the service record of the petitioner as well as pending inquiry and Government guidelines laid down in different circulars before concluding that the petitioner's

integrity was doubtful. This observation made by the Secretary (Personnel) was approved by the Chief Secretary and the Chief Minister of the State on October 8, 1986 and October 13, 1986 respectively. This is not an adverse entry made in the service record of the petitioner which is required to be communicated to the petitioner as per Government Circular dated September 5, 1981, but this is the satisfaction arrived at by the competent authority on the assessment of service record of the petitioner. Therefore, the decision taken on the basis of assessment of service record cannot be regarded as arbitrary or illegal in any manner. In such matters, court hearing a petition under Article 226 of the Constitution does not exercise appellate powers. As observed by the Supreme Court in Baikuntha Nath Das v. Chief Dist. Medical Officer, AIR 1992 SC 1021, what the Court has to see is whether order is passed by way of punishment or is the order arbitrary or malafide or based on no evidence. The facts of the case do not indicate that the order is based on no evidence. Even remotely it is not suggested by the petitioner that the order is malafide in any manner. The service record of the petitioner makes it more than clear that the decision to retire the petitioner compulsorily from service cannot be regarded as arbitrary. Therefore, the order impugned in the petition cannot be set aside on the ground that it was never communicated to the petitioner that his integrity was doubtful.

10. The contention that the order is passed to scuttle the inquiry initiated by service of chargesheet dated January 15, 1987, is also devoid of merits. As observed earlier, service record of the petitioner including different punishments imposed on him at the conclusion of departmental inquiries were taken into consideration by the competent authority before passing the impugned order. In Union of India and others vs. Dulal Datt, (1993)2 SCC 179 the Supreme Court has observed that compulsory retirement from service is not a punishment and a speaking order is not required to be passed. As held by the Supreme Court in the said decision, compulsory retirement is based on subjective satisfaction of the authority concerned. In the case before the Supreme Court, it was noted that major penalty chargesheet was issued to respondent Controller of Stores, Metro Railway in connection with finalisation of a tender case and construction of residential house at a high cost. Though Government had report of Review Committee, but instead of agreeing with it, having regard to material showing procedural lapses in dealing with tenders and vigilance/departmental enquiries, respondent

was made to retire compulsorily in public interest. The Supreme Court has held that in absence of any mala fide or arbitrariness, order can be passed even after issuance of chargesheet for major penalty and such a decision can not be regarded as arbitrary. The record of the case does not indicate in any manner that an attempt has been made by the respondents to scuttle the inquiry which was initiated against the petitioner on service of chargesheet dated January 15, 1987. The learned counsel for the respondents has pointed out to the Court that the said inquiry is also over on April 7, 1995, but order regarding punishment is not made, though it is held that the charges levelled against the petitioner are proved.

In view of the above discussion, I am satisfied that the order which is impugned in the petition is not arbitrary and is based on relevant material and, therefore, subjective satisfaction of the Government that it is expedient in the interest of public service to retire the petitioner from service is not vitiated at all. As I do not find substance in any of the points urged by the learned counsel for the petitioner, the petition cannot be accepted and is liable to be dismissed.

For the foregoing reasons, the petition fails and is dismissed. Rule is discharged, with no order as to costs.

(J.M.Panchal,J.)

(patel)